

12/18/2006

FIRST PANEL

REG. APPEAL ON INTERLOCUTORY APPEAL 470,975-6 SAO PAULO

**RAPPORTEUR** : JUDGE CARMEN LUCIA  
APPELLANT(S) : NATIONAL SOCIAL SECURITY INSTITUTE - INSS  
ATTORNEY(S) : HELIO PINTO RIBEIRO DE CARVALHO JUNIOR  
APPELLEE(S) : DIAMANTINA GONCALVES DOS SANTOS  
ATTORNEY(S) : ODERACI BARBOSA DA SILVA AND OTHER(S)

**ABSTRACT:** REGULATORY APPEAL ON INTERLOCUTORY APPEAL - CONSEQUENTIAL OR INDIRECT OFFENSE TO THE CONSTITUTION OF THE REPUBLIC - PRECEDENTS - IMPOSSIBILITY OF REVIEWING THE FACTS AND EVIDENCES ALREADY EXAMINED AND PROVIDED IN ORDINARY COURTS IN EXTRAORDINARY APPEAL - PRECEDENTS.

1. Impertinence in regards to the application for declaration of constitutionality of art. 20, paragraph 3, of Law no. 8,742/93, before the judgment of this Supreme Federal Court on the Direct Action of Unconstitutionality no. 1,232-FD, occasion in which the absence of other actual situations that would enforce constitutional assistance and absence of assumption to that norm were not informed.

2. The application of the INSS, requesting to consider the definition of the benefit granted to the Appellee incompatible with the decision in the Direct Action of Unconstitutionality no. 1.232, was denied.

3. Regulatory Appeal to which granting is denied.

J U D G M E N T

After reviewing, reporting on and discussing the case records, the Judges of the Supreme Federal Court agree, in First Panel, under the chairmanship of Judge Sepulveda Pertence, according to the minutes of judgments and shorthand notes, unanimously, to dismiss provision to the

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regulatory appeal on the interlocutory appeal, pursuant to the Rapporteur's vote.

Brasília, December 18, 2006.

[Signature]  
**CARMEN LUCIA** - Rapporteur

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R E P O R T

**JUDGE CARMEN LUCIA - (Rapporteur) :**

It is a Regulatory Appeal on Interlocutory Appeal brought by the National Social Security Institute - INSS, provided for in art. 557, paragraph 1, of the Code of Civil Procedure combined with art. 317 of the Internal Rules of Procedure of the Supreme Federal Court, on November 7, 2005, against decision rendered by Judge Ellen Gracie, then Rapporteur, on September 5, 2005, whose content is as follows:

*"1. The alleged offense to the Constitution, if there were one, would be indirect, depending on the analysis of the infra-constitutional legislation, in addition to requiring the review of the facts and the evidence of the case (Superior Federal Court Opinion no. 279), non-viable hypotheses in extraordinary stage.*

*2. On the occasion of the filing of the lawsuit (pp. 6/8), Law no. 8,742/93 was already in force; law which regulated art. 203, V, of the Federal Charter, and therefore the discussion regarding its self-applicability is unnecessary (EA 253,576, Rapporteur Sepulveda Pertence, 1<sup>st</sup> Panel, unanimous, CG of 03.24.00).*

3. **I dismiss** the appeal." (p. 50)

The Appellant sustains that

*"In this appeal, it is not a question of ordering any expertise seeking to investigate the family's income. The TRC [Federal Regional Court] of the 3<sup>rd</sup> Region has already declared that even if the family monthly income is half of the minimum wage, higher than the one established by law, (1/4 of the minimum wage) this fact does not prevent the granting of the benefit. (p. 73)*

*In short, the issue is eminently legal. The Trial Court stated that the plaintiff of the Lifelong Monthly Income does not need to earn a family monthly income lower than the minimum wage for receiving the benefit due to considering the paragraph 3 of art. 20 of Law 8,742/93 unconstitutional"*  
(p. 59).

*Furthermore, it claims that "only with the elimination of the requirement, object of the demand of the per-capita income to be less than 1/4 of the minimum wage, for the concession of the welfare benefit, is when the insufficiency of the plaintiff was considered, since, with the inclusion of the requirement, the benefit would not have been granted" (p. 59).*

The Appellant requested that this Appeal be "heard and granted to grant the extraordinary appeal, declaring the constitutionality of art. 20, paragraph 3, of Law 8,742/93, based on art. 203, V of the FC" (p. 60).

On June 27, 2006, the records ready for judgment were passed on to me.

This is the report.

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**V O T E**

**JUDGE CARMEN LUCIA - (Rapporteur):**

The Appellant does not have reason pursuant to law.

As considered in decision which denied the Interlocutory Appeal, the alleged offense to the Constitution of the Republic, if there was one, would be indirect, inasmuch as the Appellant's arguments address mainly the violation of art. 20, paragraph 3, of Law no. 8,742/93.

It is a pacific understanding in this Supreme Federal Court that the impossibility to analyze, by means of extraordinary appeal, indirect offense to the Constitution, according to precedents in various matters proposed in extraordinary appeal: SA 488.982-RA/MG, Reporting Judge Eros Grau, Second Panel, CG 12.01.2006; EA 281.493- RA/SP, Reporting Judge Ricardo Lewandowski, First Panel, CG 11.10.2006; SA 482,879-RA/RJ, Reporting Judge Eros Grau, Second Panel, CG 11.10.2006; EA 473.420- RA/SP, Reporting Judge Ricardo Lewandowski, First Panel, CG 11.10.2006; SA 434,911-RA/RJ, Reporting Judge Eros Grau, Second Panel, CG 10.27.2006; EA 362.600-RA-ED-ED/SP, Reporting Judge Cezar Peluso, First Panel, CG 10.06.2006; EA 241,422-RA/CE, Reporting Judge Carmen Lucia, First Panel, CG 11.06.2006; and EA 473,417-RA/AM, Reporting Judge Cezar Peluso, First Panel, CG 06.30.2006.

In addition, the issue has been clarified in the reporting judge's opinion, Federal Judge Roberto Haddad on the occasion of the

trial of the appeal and the official referral of the case records of Process no. 2000.03.99.059921-6, under the following terms:

*"A priori, it is relevant to note that art. 203, in addition to being self-operative, was regulated by Law 8,742/93 which, in turn, was regulated by Decree no. 1,744/95 article 3, sole paragraph, legitimizing the National Social Security Institute- INSS, as being liable for payment of the benefit. (...) According to evidence from the case records, it has been noticed that the legal requirements for granting of the Social Assistance were verified' (pp. 14-15).*

Accordingly, the Appellant intends, despite claiming otherwise, to review the facts and evidences already examined and provided in ordinary courts, which, as already stated, is unfeasible in the extraordinary appeal stage.

In this sense, this Supreme Federal Court has already pronounced itself, repeatedly, including instances in which the applicability of Law no. 8.742/93 was debated:

*"ABSTRACT: SOCIAL SECURITY LAW. WELFARE BENEFIT. MINIMUM WAGE. LAW No. 8,742/93. SPECIFIC REQUIREMENTS. REVIEW OF EVIDENCE. OPINION 279. The factual framework outlined by the respondent Court, is that there is evidence that the plaintiff does not have sufficient means to provide for his/her own basic needs, or have those needs provided by his/her family, and therefore the benefit should be granted to the plaintiff. This being the framework, the prohibition from Opinion 279 of this respectable Court must incur, since the review of the evidence in extraordinary stage is unfeasible. Regulatory Appeal to which granting is refused.*

(IA 467,204-RA/SP, Reporting Judge Carlos Britto, First Panel, CG 09.30.2005)

And, also:

*"ABSTRACT: CONSTITUTIONAL. SOCIAL AND PENSION BENEFITS. SOCIAL ASSISTANCE. DISABLED PEOPLE AND THE ELDERLY IN STATE OF MISERY. Federal Constitution (F.C.), art. 203, V; Law no. 8,742, of 12.7.93. I. - Due to reviewing of Law 8,742/93, section V of art. 203, F.C. II became immediately applicable. - In this case, the decision which granted the benefit is later than the aforementioned Law 8,742/93, and was granted from the summon, and this occurred under the ruling of the mentioned Law 8,742/93. III. - EA not granted. (EA 315,959-SP, Reporting Judge Carlos Velloso, Second Panel, CG 10.5.2001)*

Along the same lines, the First Panel also decided: IA 586,066 - RA/SP, Reporting Judge Carlos Britto, First Panel, CG 10.27.2006; IA 598,302- RA/SP, Reporting Judge Carlos Britto, First Panel, CG 10.27.2006; IA 461,013- RA/SP, Reporting Judge Carlos Britto, First Panel, CG 10.27.2006; IA 477,977- RA/SP, Reporting Judge Carlos Britto, First Panel, CG 9.30.2006; IA 396,830- RA/SP, Reporting Judge Carlos Britto, First Panel, CG 11.4.2005; IA 415,693- RA/SC, Reporting Judge Carlos Britto, First Panel, CG 7.1.2005; IA 418,614- RA/SC, Reporting Judge Carlos Britto, First Panel, CG 7.1.2005; IA 360,760- RA/SC, Reporting Judge Eros Grau, First Panel, CG 4.22.2005; and EA 396,907- RA/MS, Reporting Judge Eros Grau, First Panel, CG 12.17.2004.

The application for declaration of constitutionality of art. 20, paragraph 3, of Law no. 8,742/93 seems impertinent, to the extent that this Supreme Court has already done so, on the occasion of trial of Direct Action of Unconstitutionality no. 1,232- FD. However, to conclude, that the Supreme Court had as constitutional, in thesis (it handled abstract control), the regulation of art. 20 of Law no. 8,742/93, but

the absence of other actual situations that would enforce constitutional assistance and absence of assumption to that regulation were not informed.

Thus, the constitutionality of the legal regulation does not mean the unconstitutionality of judicial behaviors, which, to meet, in specific cases, the Constitution, guarantor of the principle of human dignity and the right to health, and the State obligation to provide social assistance "to those who need it, regardless of their contribution to social security", have to determine that payment on the realization of the need of the disabled person, or the elderly who cannot provide his/her own maintenance or have it provided by his/her family.

Extreme poverty has been defined, legally, as "la marque d'une infériorité par rapport à un état considéré comme normal et d'une dépendance par rapport aux autres. Elle est un état d'exclusion qui implique l'aide d'autrui pour s'en sortir. Elle est surtout relative et faite d'humiliation et de privation." (TOURETTE, Florence. *Extreme pauvreté et droits de l'homme*. Paris: LGDJ, 2001, p. 4).

The INSS, herein the Appellant, requests to consider the definition of the benefit granted to the Appellee incompatible with the decision in the Direct Action of Unconstitutionality no. 1,232. This is not the case herein.

I state: and the misery observed by the judge is incompatible with the dignity of human beings, a right secured in art. 1, section III, of the Constitution of the Republic; and the policy set to ignore the misery of the Brazilian people is incompatible with the principles set forth in art. 3, and its provisions of the Constitution; and the denial of the Judiciary to recognize, in this specific case, the confirmed



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situation, and the alternatives that the Constitution offers not to let one Brazilian person die due to penury, is incompatible with the jurisdiction guarantee, to all secured as a fundamental right (art. 5, section XXXV, of the Constitution of the Republic).

Therefore, based on Opinion 279 of the Supreme Federal Court, **I keep the reviewed appealed ruling by its own rationale and vote to dismiss the present Regulatory Appeal.**

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SUMMARY OF MINUTES

**REG. APPEAL ON INTERLOCUTORY APPEAL 470,975-6**

ORIGIN: SAO PAULO

**RAPPORTEUR: JUDGE CARMEN LUCIA**

APPELLANT(S): NATIONAL SOCIAL SECURITY INSTITUTE - INSS

ATTORNEY(S): HELIO PINTO RIBEIRO DE CARVALHO JUNIOR

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**Decision:** The Panel dismissed the regulatory appeal on the interlocutory appeal, pursuant to the Rapporteur's vote. Unanimous. Judge Marco Aurelio, excusable absence. 1<sup>st</sup> Panel, 12.18.2006.

Presidency of Judge Sepulveda Pertence. Judges Carlos Britto, Ricardo Lewandowski and Carmen Lucia attended the session. Judge Marco Aurelio justified his absence. Judge Eros Grau also attended, in order to judge processes linked to his own work.

Deputy-Attorney General of the Republic, Dr. Rodrigo Janot.

[Signature]  
Ricardo Dias Duarte  
Coordinator

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